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VENABLE, BAETJER, HOWARD & CIVILETTI  
ATTORNEYS AT LAW

A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

BALTIMORE, MD  
MCLEAN, VA  
ROCKVILLE, MD  
TOWSON, MD  
BEL AIR, MD

SUITE 1000  
1201 NEW YORK AVENUE, N. W.  
WASHINGTON, D.C. 20005-3917  
(202) 962-4800  
FAX (202) 962-8300  
TELEX 898032

RICHARD M. VENABLE (1839-1910)  
EDWIN G. BAETJER (1868-1945)  
CHARLES MCH. HOWARD (1870-1942)

FEB 12 1993  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

WRITER'S DIRECT NUMBER IS

(202) 962-4811

February 12, 1993

**BY HAND DELIVERY**

The Honorable Donna H. Searcy  
Secretary  
Federal Communications Commission  
1919 M Street N.W., Room 222  
Washington, DC 20554

RE: Reply Comments of the Mayor and City Council of  
Baltimore, MM Docket No. 92-266

Dear Ms. Searcy:

Please find enclosed a corrected copy of the Reply Comments which were filed on behalf of the Mayor and City Council of Baltimore in the above-reference docket on February 11, 1993. A printer had been malfunctioning, but it was only after the Reply Comments were filed that it was discovered that pages had inadvertently been omitted.

We therefore submit the enclosed corrected original with nine copies. Other parties to this proceeding have been served with corrected copies. We apologize for any inconvenience.

Very truly yours,



Barbara L. (Pixie) Waite

BLW/arp

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FEB 12 1993

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

**FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY**

In the Matter of )

Implementation of Sections )  
of the Cable Television )  
Consumer Protection and )  
Competition Act of 1992 )

Rate Regulation )

MM Docket No. 92-266

**REPLY COMMENTS OF THE MAYOR AND  
CITY COUNCIL OF BALTIMORE**

[Corrected Copy]

H. Russell Frisby, Jr.  
Barbara L. Waite  
Venable, Baetjer, Howard &  
Civiletti  
1201 New York Avenue, N.W.  
Suite 1000  
Washington, DC 20005  
(202) 962-4800

Counsel for the Mayor and  
City Council of  
Baltimore

February 11, 1993

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## **SUMMARY OF ARGUMENT**

## **SUMMARY OF ARGUMENT**

The Federal Communications Commission ("FCC") has been given the responsibility of implementing the *Cable Act of 1992* with assistance from local cable franchising authorities. The details of that implementation are issues in which the average consumer has little interest. Baltimore City's citizens understand that the purpose of the *Cable Act* is to rein in cable operators and their monopoly profits. They will look to Baltimore City to act and Baltimore City does not wish to disappoint them.

Baltimore City, as the local cable franchising authority, is in the best position to determine whether its cable system is subject to any type of effective competition which would keep rates reasonable. Knowing that there is only one cable system franchised to operate in Baltimore City and that its rates are, on their face, unreasonable, Baltimore City intends to continue working with consumers and with the FCC to see that rates for basic cable service are reasonable, including rates for those services termed by the Cable Act as "cable programming services", such as CNN, BET, MTV, and the like, and that service charges and equipment charges are related to the cost of providing those services.

It is only by tying the cost of providing these services, with a reasonable profit allowed, to the rates charged that Baltimore City believes any aspect of them can be considered "reasonable". This is the approach which it advocates to the

Commission, even if practicalities require a phase-in period in which a more mechanistic approach is used to reduce cable service rates.

Only Baltimore City, and the other cable franchising authorities, can efficiently and effectively investigate consumer complaints regarding cable programming service rates. As a result of Baltimore City's expertise and investigation, the Commission will be able to respond more quickly and more effectively.

Attempts by local cable system operators to evade the intent of the Cable Act have already been identified by Baltimore City and are detailed in its Comments. Only if consumers, Baltimore City (as the local cable franchising authority), and the Commission pool their expertise, their resources, and their efforts can these attempts be frustrated.

The Commission cannot, however, adopt a regulatory regime which inhibits the efforts of local franchising authorities and consumers out of concern for regulatory burdens on cable system operators. Neither should the Commission underestimate the degree of frustration which Baltimore City has observed among its citizens over the conduct of cable systems.

The consumer expects action. Baltimore City is ready, willing, and able to do its part. It encourages the Commission to adopt a regulatory regime which effectuates the goal of the Cable Act -- to provide the benefits of competition in

cable services in the absence of that competition. Baltimore City and the Commission owe the consumer no less.

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FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In the Matter of	)	
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Implementation of Sections	)	MM Docket No. 92-266
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Consumer Protection and	)	
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	)	
Rate Regulation	)	

**REPLY COMMENTS OF THE MAYOR AND  
CITY COUNCIL OF BALTIMORE**

The Mayor and City Council of Baltimore ("Baltimore City"), by their attorneys, hereby submit their Reply Comments to Comments filed in response to the *Notice of Proposed Rulemaking* ("NPRM") released on December 24, 1992, in the above-captioned proceeding.

**I. FRANCHISING AUTHORITY RESPONSIBILITIES**

As a preliminary matter, Baltimore City recognizes that cable franchising authorities fall into two general categories. Many smaller franchising authorities lack the resources to seek certification pursuant to the *Cable Act of 1992* ("Cable Act") but do not want their constituents to be deprived of the intended benefits of the *Cable Act* thereby. Larger franchising authorities may have more experience and capabilities which permit them to seek certification but share the problem of limited resources. Baltimore City believes that the *Cable Act* was intended to benefit all consumers of cable services and that the regulatory regime established



by the Commission should take into account these different situations. Baltimore City believes that its proposals, and those of many other commenters, are consistent with this recognition as follows.

#### **A. Effective Competition Determination**

Baltimore City believes that the franchising authority is in the best position to make an initial determination on whether effective competition exists within the franchise area. The franchising authority will be familiar with those systems who have been granted a franchise within the franchising authority's service area. It will already have knowledge of how many there are, the boundaries of their service area(s) and whether they overlap and, if so, to what extent, and the boundaries of the franchise.

A cable system operator should, of course, be permitted to challenge this initial determination but it should bear the burden of presenting evidence to the Commission supporting its contention that effective competition does exist. Market information on multichannel video programming providers which the cable system operator considers to be competitors will, as a matter of business practicalities, already have been gathered by the cable system operator but would not be available to the franchising authority if such competitors were not required to obtain a franchise.

This approach offers a clearly definable standard which would not place an undue burden on either party -- the franchising authority or the cable system

operator -- because it calls upon each party for that specialized knowledge which it is most likely to have already. It also permits even the smallest franchising authorities to assist the Commission in making this determination, as no additional resources would be required.<sup>1</sup>

As a procedural matter, the franchising authority's determination should be effective, even if challenged, until such time as the Commission rules on a cable system operator's challenge. This is necessary in order to avoid procedural delaying tactics to avoid implementation of the reasonable rates required by the Cable Act.

#### **B. Certification Procedure**

The purpose of the certification procedure is merely to ensure that the local franchising authority has both authority, under the relevant local law, to regulate and sufficient resources to do so. The Commission's policy has long been to rely upon the good faith of the parties before it, and there is no basis for changing that policy in this instance.<sup>2</sup>

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<sup>1</sup> A determination that effective competition does or does not exist within the franchise area is necessary in order to determine if basic rate regulation is authorized under the *Cable Act*. Once this determination is made, the franchising authority may seek certification (or not).

<sup>2</sup> No one has suggested any reason for a franchising authority to falsify a certification for purposes of regulation. Indeed, this proceeding is replete with communities who openly acknowledge their lack of resources necessary for certification.

Thus, a postcard-type of certification similar to that contained in Appendix D of the *NPRM* should be sufficient.<sup>3</sup> The only change to the information requested would be that item 6), the effective competition inquiry, would be divorced from the certification procedure in order to draw upon the knowledge of the local franchising authority, as discussed above, regardless of whether that franchising authority seeks certification.

## **II. BASIC SERVICE RATE REGULATION**

Baltimore City proposed in its Comments that the local franchising authority should have the flexibility to choose between a direct cost-of-service regulatory regime and a benchmark regulatory regime, depending upon which is more suited to local circumstances and best protects local consumer welfare. If the Commission believes that developing a cost-of-service regime within the congressionally-mandated time period is not feasible, Baltimore City suggests the following alternative as an interim measure.

### **A. Cost-of-Service Regime as Regulatory Goal**

Baltimore City believes that, if a choice must be made between regulatory regimes, that a traditional, cost-based approach offers the best opportunity for a franchising authority to determine if rates are reasonable. It agrees with other commenters who have concluded that the congressional intention was that the

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<sup>3</sup> The Commission's experience with postcard-type renewal applications in the broadcast services demonstrates the effectiveness and efficiency of this approach.

basic tier of cable service be treated as a necessary service and regulated in a similar manner to common carrier services.<sup>4</sup>

Towards this end, Baltimore City agrees that the Commission should establish a uniform system of accounts similar to that proposed in Appendix A of the *NPRM*. The application of a cost formula based upon a uniform system of accounts, applied on a local basis by the franchising authority, will minimize the regulatory burden on all parties. The cable system operator's accounts and records must, therefore, be made available to the franchising authority for inspection both in connection with rate investigations and proposed rate increases.<sup>5</sup>

#### **B. Interim (12-Month) Regime**

Baltimore City recognizes, however, that establishment of a cost-based, rate-of-return regulatory regime would be extremely difficult, if not impossible, before April 1, 1993. Thus, interim measures may be necessary.

If so, Baltimore City submits that the approach put forward by the Consumer Federation of America ("CFA") should be adopted as the most appropriate interim benchmark for a temporary approximation of reasonable rates. The CFA formula

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<sup>4</sup> The regulation is "similar" in that it is cost-based; it should not be identical, contrary to the arguments of the Regional Bell Holding Companies. A regime of price caps, with its baskets of related services, is unnecessarily complex and flatly unnecessary for rate regulation of basic services. Furthermore, many franchising authorities already have experience with rate of return regulation, thus lessening the confusion accompanying any transition period to a new regulatory regime.

<sup>5</sup> Of course, provision for protection of proprietary or confidential information should be made.

takes into consideration all necessary factors, such as the influence of rate regulation, inflation, development of the advertising revenue stream, and programming. To the extent that the CFA formula is considered "minimalist" by the cable system operators, this will serve as an incentive for them to cooperate in the development of a more realistic rate-of-return regime, which, Baltimore City submits, should be implemented no later than April 1, 1994.

### **C. Procedures**

Comments filed by franchising authorities generally agree that they must have the flexibility to hold formal ratemaking proceedings and hearings. These may not always be necessary, but the option must be available.

In Baltimore, the issue of cable rates is an issue of high importance to consumers, including both existing subscribers and would-be subscribers. The public will demand, and is entitled to, open procedures in which consumers have an opportunity to be heard on the reasonableness of existing or proposed rates.

In order to ensure adequate time for consumer participation and franchising authority review, the cable system operator should give 30 days' notice to the franchising authority and subscribers of any proposed changes in rates. The franchising authority would advise the cable system operator within this time period if further investigation will be required and the nature of that investigation, with at least another 90 days in which any investigation or ratemaking proceeding must be conducted.

Changes in rates can be made effective only upon approval by the franchising authority. This will encourage prompt cooperation by the cable operator with franchising authority investigations and eliminate accounting for refunds. Setting an outside time period for proceedings to be conducted should allay the cable operator's concerns of delay.

### **III. CABLE PROGRAMMING SERVICE RATE REGULATION**

For cable programming services other than those offered "a la carte" or "pay-per-view", Baltimore City believes that these rates should also be broken down on a per channel basis and a reasonable rate identified based on cost. While the programming cost may be consistent on a national basis, suggesting that the Commission could reasonably establish a "national" benchmark, that portion of the joint and common cost shared with other cable services which is to be allocated to the particular channel will necessarily vary by locality.<sup>6</sup> Unless these rates are regulated in a consistent manner, i.e., based on the same uniform system of accounts, formula, etc., it will be impossible to determine their reasonableness.

Baltimore City does not believe that cost-based regulation will discourage or eliminate either reasonable profit or system and programming improvements. If anything, the greater concern under such a regime would be to discourage gold-

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<sup>6</sup> Alaska Cablevision, Inc. points out in its comments how dramatically the locale can affect the cost of an installed system (or plant).

plating of systems and unnecessary system re-builds. As demonstrated by CFA, cost-based regulation is consistent with reasonable profit, improved systems and programming, and reasonable rates to the consumer.

If, however, as noted above, the time constraints faced by the Commission make it infeasible to implement traditional cost-based regulation by April 1, Baltimore City submits that the CFA's formula for cable programming services would also provide an acceptable interim measure for the same reasons as discussed above. Baltimore City firmly believes that the CFA formula is appropriate only as an interim measure and that a full cost-based regulatory regime, as applicable to individual localities, should be placed in effect by April 1, 1994.

#### **IV. OTHER REGULATION UNDER THE ACT**

Baltimore City is not attempting to address all of the issues raised by the *NPRM* and commented upon, only those of the most significance to consumers in Baltimore City. In addition to rate regulation, these issues are service charges, equipment charges, billing, and the opportunity for complaints to be heard and acted upon.

##### **A. Service Charges**

Contrary to the suggestions of our local cable operator, both in its parent company's Comments and in the local operator's letter attached hereto as Exhibit A, no cable operator is being forced to re-tier its service offerings in order to comply

with the *Cable Act*. This is a choice being made by the cable operator, as discussed more fully below, to avoid regulation by local franchising authorities. It would, therefore, be adding injury to insult for subscribers to be charged for a change in service tier forced upon them by the actions of the cable system operator.

All other service charges, i.e., installation and changes in services ordered, should also be cost-based with a reasonable return allowed. The cable operator in Baltimore City, for example, when a non-standard installation is required for service, quotes a charge of "cost plus 15%", although no itemization is offered on how the "cost" figure is derived. To the extent that the cable operator wishes to offer installation "loss leaders" to attract new subscribers, this may be permissible, as CFA points out, if the "loss" comes from the cable system operator's profits but not if it is to be subsidized by rate increases to existing subscribers for other services.

## **B. Equipment Charges**

Baltimore City does agree with the Regional Bell Holding Companies that the same rules should apply to cable subscriber equipment as to telephone equipment, with certain qualifications. First, the subscriber equipment now provided exclusively by the cable system operator should be offered on an "unbundled" basis and should be available for purchase as well as for lease.



Furthermore, the cable system operator should be precluded from objecting to the use and connection of suitable third-party origin equipment by the subscriber. Because such equipment is already subject to the Commission's authorization requirements, there can be no question of its causing any harm (except, possibly, to the system operator's bottom line).

Secondly, the annual recoupment of the equipment's purchase price from exorbitant lease rates to the subscriber must cease. At least until third-party sources for this equipment develop, the rates for equipment must be regulated under the same reasonableness requirement as other rates. Therefore, the rates must be cost-based, with a reasonable profit allowed.

### **C. Billing Information**

Baltimore City also believes, with the New York Cable Commission, that the intent of the 1984 Cable Act was not to establish a line-item franchise fee disclosure as a method for the cable operator to recoup additional review and/or avoid partial payment of the franchise fee. In the event, however, that the Commission concludes that a line-item approach is permissible, Baltimore City believes that a similar approach should be applied to the fees charged by the cable operator. All services and their component costs should be itemized and identified as well.

In addition, any proposed change in or to billing methods, fees, equipment, tiers, or services should be provided to the subscriber in detail at least 30 days

prior to the proposed effective date. Baltimore City also agrees that the subscriber should also receive information on where and how to complain regarding any proposed changes or services received.

## **V. ENFORCEMENT**

Any regulatory regime is mere window dressing without adequate enforcement. Baltimore City agrees with those commenters who posit that the franchising authorities can and should be the first line of enforcement for the rate provisions of the *Cable Act*.

### **A. Evasion Attempts**

Baltimore City has already identified several areas in which efforts are being made to avoid the intended consequences of the *Cable Act*. Among the greatest concerns are: preemptive rate increases, effected between enactment of the *Cable Act* and the implementation date of rate regulation; discriminatory pricing among consumers; and retiering, i.e., adjusting the services offered and accompanying rates. Rollbacks and refunds are not enough to deter all of these practices; franchising authorities and the Commission must be ready, willing, and able to assess fines and forfeitures as necessary, until the message of the *Cable Act* is received.

#### **1. Preemptive Rate Increases**

Baltimore's cable system operator joined a widespread effort to slip rate increases in "under the wire" prior to the implementation of the regulations

anticipated by the *Cable Act*. This is evidenced by Exhibit B, which, two weeks after the enactment of the *Cable Act*, announced a round of rate increases effective January 1, 1993. There is no doubt that Congress intended that such increases be recognized for what they are and that rollbacks and refunds be applied as appropriate.

Baltimore City believes that it is the intent of the Act to rollback rates which are not reasonable, regardless of when they were instituted (although these preemptive increase attempts suggest the nature of the beast with which franchising authorities and the Commission are dealing). Furthermore, any rates which are found to be unreasonable after the enactment of the *Cable Act* are legally candidates for refunds to subscribers.

## ***2. Discriminatory Pricing***

Baltimore City agrees that rates should be uniform throughout the franchise area to avoid discriminatory pricing. Discriminatory pricing can take different forms for different purposes: offering more affluent housing areas discounted rates encourages more subscribers among a group known for premium service tendencies; discounting a competitor's rates only in the service areas in which there is competition is essentially predatory.

Offering discounts to certain groups of citizens would not necessarily be discriminatory, however, if the discounts were available throughout the entire franchise area. For example, a "senior citizen's" discount or a discount for "shut-

ins" or disabled citizens would not be discriminatory so long as the discount were available throughout the franchise area.<sup>7</sup>

What cannot be lost sight of in this proceeding is that the purpose of the *Cable Act* is to protect consumers, not competitors. Competition to cable system operators may, in the long run, indeed be the best method of ensuring quality video programming services to consumers at reasonable rates. In the meantime, consumer welfare cannot be jeopardized by an understandable desire to encourage the development of competitors to monopoly cable system operators.

### *3. Retiering*

Baltimore's cable system operator has announced to the Mayor that it will institute a new basic tier as of April 1, 1993, comprising only four broadcast networks and the PEG channels, i.e., the signals used by the *Cable Act* to identify that tier to be regulated by franchising authorities as basic service. Although the rate for this service is not contained in the attached Exhibit B, Baltimore City has been advised that it will be \$10.

At first glance to the consumer, this change appears to represent a substantial reduction in rates, \$18 to \$10 for basic cable service, a "bargain". Upon closer examination, however, this change demonstrates the cable system operator's continued attempt to extract monopoly profits from the consumer.

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<sup>7</sup> A basic service tier at reasonable rates may, in addition, make the issue of such discounts moot.

The new "broadcast basic" tier will contain 17 channels, two of which are program guide or "coming attraction" channels for the cable system itself. Such a "broadcast basic" tier is something very different from what the typical subscriber is accustomed to consider "basic cable" service, creating a potentially misleading impression to the subscriber that rates are being reduced. This new "stripped down" tier represents a reduction in channels from 44 to 17, for a net reduction of 27 fewer channels, at the "bargain" rate of \$10 as compared to \$18.

As the operator admits, few Baltimore City cable subscribers are likely to be affected by this change because most already pay \$19.65 for 49 channels. What is clear to Baltimore City, however, is that the cable system operator is rearranging its program offerings because it does not wish to have to justify the rates for the remainder of its programming services to Baltimore City. It obviously believes that if it avoids the examination of Baltimore City, that of the Commission, if any, will be perfunctory and it will be "business as usual".

#### **B. Consumer Complaints**

Neither Baltimore consumers nor Baltimore City are prepared for this type of "business as usual": continued extortion of monopoly profits from consumers as the Commission turns a blind eye and the purpose of the *Cable Act* is defeated. Baltimore City intends to continue its responsiveness to consumer complaints and to use all of its new authority to work both with consumers and the Commission to ensure that the goals of the *Cable Act* are met.

Towards this end, there must be a consumer complaint procedure which is meaningful. As CFA rightly points out, it cannot be too comprehensive and demanding, or the procedure alone will discourage consumer action. On the other hand, Baltimore City understands that the Commission needs a fuller record in order to conduct any type of meaningful investigation.

Baltimore City believes that the franchising authorities, whether certified for rate regulation or not, can provide the initial resource for the consumer with complaints against the local cable operator. Less information will be needed for the franchising authority to investigate because it will already have more information available to it. Informational meetings at which consumer concerns can be aired can be held locally. By the time the franchising authority has reviewed a complaint and added its views and data for transmission to the Commission, a record will be available upon which the Commission can readily act. This approach will permit the franchising authority to fulfill the role expected of it by its citizens, permit initial factfinding and investigation in a more efficient and expedient manner, and reduce the burden of responding to and investigating complaints on all concerned.

### **CONCLUSION**

The importance of the franchising authority's role both in rate regulation for basic services and in the complaint process for programming services cannot be overstated. Regardless of the details of the *Cable Act* and whatever regulations

the Commission may implement, the citizens of Baltimore City will look to city government for redress if appropriate action is not taken in the wake of the *Cable Act's* enactment. Baltimore City must have the active means to fulfill these expectations under the new *Cable Act* regime.

Respectfully submitted,

THE MAYOR AND CITY COUNCIL OF  
BALTIMORE

By:



H. Russell Frisby, Jr.  
Barbara L. Waite  
Venable, Baetjer, Howard &  
Civiletti  
1201 New York Avenue, N.W.  
Suite 1000  
Washington, DC 20005  
(202) 962-4800

Their Counsel

February 11, 1993

EXHIBIT A



United Artists Cable  
of Baltimore  
2325 Kirk Avenue  
Baltimore, MD 21218  
(410) 338-2777

JAN 21 1993

REVISED COPY



January 20, 1993

Euan F.D. Fannell  
President & General Manager

The Honorable Kurt Schmoke  
Mayor of Baltimore City  
City Hall  
100 N. Holliday St.  
Baltimore, MD 21202

Dear Mayor Schmoke:

On April 1, United Artists Cable of Baltimore will reconfigure our service levels to offer a reasonably priced, entry-level service. This service level will offer four broadcast networks, such as WMAR, WJZ, WBAL and Fox 45, the most popular in Baltimore and all public and government access channels. The cost will be \$10.00 a month.

We have conducted research that tells us customers would like us to offer such a low-cost entry-level service. In addition, last October, the Congress passed a new Federal Cable Act. The Act implies that cable systems offer such a service. It does not require that we offer one, but it's clear that such a low-priced entry-level of service was desired by Congress. As a result of the Cable Act and our own customer research, we decided to offer this low-cost service level. This type of entry-level service is fairly standard in the industry.

To offer it, we need to reconfigure our two existing service levels. Some of the cable networks that are presently on basic will be placed on Expanded Basic. We will be offering the same networks, but some of them will be moved from one service level to the other.

For the vast majority of our customers (99%) this re-configuration will make little difference. They already subscribe to both the Basic and the Expanded Basic service levels. They will continue to receive the same networks for the same total price.

The reconfiguration will affect a minority of our customers -- less than 1%. These customers now subscribe only to Basic. They will have to decide whether they want to receive only broadcast and public access networks, or whether they want to receive cable networks as well. If they want cable networks, they can decide to subscribe to both Basic and Expanded Basic. We hope they will